THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION Nos.5008 & 7290 of 2003

Dated : 25-01-2006

W.P.No.5008 of 2003

Between:

M.Venkateswarlu, S/o.Narasimhayya.

.. **PETITIONER**

AND

The Appellate Authority under the A.P.Shops and Establishment Act, 1988 and others.

.. RESPONDENTS

W.P.No.7290 of 2003

Between:

The Management of Badam Balakrishna Hotels Pvt. Ltd.

.. **PETITIONER**

AND

M.Venkateswarlu, S/o.Narasimhayya and others. **.. RESPONDENTS**

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COMMON ORDER:

Against the order of the appellate authority, under the A.P.Shops and Establishment Act, 1988, in S.A.No.15 of 2002, dated 10-01-2003, both the employer and employee are before this court. W.P.No.5008 of 2003 is filed by the employee and W.P.No.7290 of 2003 is filed by the employer. Since both the writ petitioners arise against the very same order passed in S.A.No.15 of 2002, dated 10-01-2003, both the writ petitions were heard together and are now being disposed of by a common order.

It would suffice, if the facts in W.P.No.7290 of 2003 are taken note of. The petitioner is a private limited company registered under the Companies Act. The 1st respondent, the General Manager cum Tax Consultant of the petitioner Hotel, filed a petition under Section 48 of the A.P.Shops and Establishments Act, 1988 (for short "the Act) in S.E.No.7 of 2002 before the Assistant Commissioner of Labour and the same was dismissed as not maintainable. Thereafter, the first respondent filed an application under Section 51(1) of the Act, in S.E.No.52 of 2001 before the second respondent. The first respondent contended that he had resigned from service with effect from 05-10-1998 and his last drawn wage was Rs.6,000/- and that he was entitled for the following benefits:

a. Retrenchment compensation of Rs.15,000/-.

b. Leave Encashment of Rs.12,000/-.

c. Wages from the date of resignation till date i.e., for 18 months at Rs.6,000/- (i.e. Rs.1,08,000/-).

d. Bonus for two years 1998-99 at Rs.6,000/- per year of Rs.12,000/-.

The first respondent claimed a total amount of Rs.1,47,000/-. The second respondent, by order in S.E.No.52 of 2001, dated 23-04-2002, allowed the claim of the first respondent for Rs.93,000/-, break up of which is as under:

Service compensation under Section 47(3) (for three years of service from 01-04-1996 to 05-10-1998)	Rs. 9,000/-
Bonus for the year 1998	Rs.12,000/-
Wages under Section 47(4) of the Act (for one year from 05-10-1998) @ Rs.6000/- p.m. wages	Rs.72,000/-
Total	Rs.93,000/-

Insofar as bonus is concerned, while the claim of the first respondent was for a period of two years (i.e., 1998-99) at Rs.6,000/- per year, the second respondent held that the first respondent was entitled to bonus for the year 1998 and not for the year 1999, inasmuch as he had resigned from service in the year 1998 itself. In effect the second respondent rejected the claim of the first respondent for payment of bonus for the year 1999 and allowed the claim for the year 1998. Aggrieved by the order of the second respondent in S.E.No.52 of 2001, the petitioner-employer preferred the second appeal in S.A.No.15 of 2002. Insofar as the first respondent is concerned, since no appeal was preferred against the order of the second respondent, the order in S.E.No.52 of 2001 attained finality.

The third respondent-appellate authority, by order in S.A.No.15 of 2002, dated 10-01-2003, reduced the total amount payable to the first respondent from Rs.93,000/-, as awarded by the original authority, to Rs.56,055/-, break-up of which is as under:

i)	Service compensation under Section 47(3) (for 3 years of service from 1-4-1996 to 05-10-1998)	Rs. 6,000/-
ii)	Bonus for the financial year 1998-99	Rs. 2,055/-
iii)	Wages under Section 47(4) of the Act (for one year from 05-10-1998 @ Rs.4,000/- p.m. wages	Rs.48,000/-
	Total:	Rs.56,055/-

The third respondent-appellate authority rejected the contention of the petitioner herein that the first respondent did not fall within the definition of ‘employee’ under Section 2(8) of the Act since Section 73(a) exempts employees in managerial positions from the applicability of the Act. The third respondent held that though the first respondent was designated as General Manager- cum-Tax Consultant, there was nothing on record to show that he had managerial powers and, that the first respondent must be held to be an employee within the meaning of Section 2(8). The

3rd respondent also held that merely because the employee was responsible for all income tax matters and to attend to all assessment, appeals, upto the tribunal level, it could not be said that the employee was in the shoes of the management.

Before this court Sri B.Vijaysen Reddy, learned counsel for the petitioner, would challenge the order of the appellate authority (3rd respondent) contending that the service compensation, under Section 47(3) of the Act, of Rs.6,000/- and wages under Section 47(4) of the Act of Rs.48,000/- could not have been granted in view of the fact that the Full Bench of this court, in ***SRINIVASA RESORTS LIMITED*** Vs. ***STATE OF A.P.,*** had declared Section 47(3) and (4) ultravires. Learned counsel would contend that since the first respondent is not an employee within the meaning of Section 2(8) in view of his being in managerial position and being exempted from the applicability of the Act under Section 73(a), both the orders of the second and third respondents are without jurisdiction.

As noted earlier, the appellate authority (3rd respondent) has specifically recorded a finding that the first respondent was not holding a managerial position. Nothing has been placed before this court to show that the finding of the 3rd respondent in this regard is perverse. It is well settled that findings of fact, of Tribunals and quasi judicial authorities, ought not, normally, to be re-appreciated in proceedings under Article 226 of the Constitution of India and since both the primary and the appellate authority have held that the first respondent was an employee under Section 2(8), the plea of lack of jurisdiction has necessarily to be rejected.

I however find considerable force in the other submission, of Sri B.Vijaysen Reddy, based on the judgment in ***Srinivasa Resorts*** (supra 1), wherein, the Full Bench held thus:

"…….. If the Legislature intended to apply the provisions of the Payment of Gratuity Act it could say so in no uncertain terms. It is accepted at the Bar that the provisions in the said Act are more harsh than the Payment of Gratuity Act. Furthermore, in a factory or an industrial undertaking a large number of workers or workmen would be employed, whereas in shops and establishments the number of employees may be of varying nature. In some cases, an employer of a shop may employ one or two employees. To put much more heavy burden upon a small investor than an employer of a factory or an industrial undertaking cannot be said to be reasonable. They belong to different classes, but as by reason of the impugned provision, harsher measures had been imposed unreasonableness of the statute becomes more apparent. Sub-section (3) of Section 47 must, therefore, be held to be discriminatory and unconstitutional……."

"……. We may now examine sub-section (4) of Section 47. It seeks to continue the relationship of employer and employee despite cessation of employment insofar as the employer has to go on paying him wages unless the dues in terms of sub-section (3) of Section 47 are actually paid. Sub-Section (4) of Section 47 is patently arbitrary and unreasonable. Such a provision can by no stretch of imagination be considered to be protective employment; as it applies also to those employees who have resigned or voluntarily retired. By reason of the said provision, even if an employee resigned the service on his own volition and joined another shop or establishment for higher wages, even then also the employer has to pay wages till he was paid service compensation even though he gainfully earns in the other shop or establishment. Such a provision, in our view, is contrary to the basic principles of service jurisprudence and would amount to unreasonable discrimination. Arbitrariness and unreasonableness being inherent in the provision attracting the wrath of Article 14 of the Constitution, the same must be held to be unconstitutional……..."

"…… For the reasons aforementioned, we hold that the sub-sections (3) and (4) of Section 47 of the Shops Act are unconstitutional and amounts to unreasonable discrimination and violative of Article 14 of the Constitution of India. Let a writ of mandamus issue accordingly. Writ Petition is disposed of accordingly. No order as to costs……."

The law declared by the Full Bench of this court in ***Srinivasa Resorts*** (supra 1) is binding and since the orders of both the 2nd and 3rd respondents in granting

service compensation under Section 47(3) and wages under Section 47(4) are contrary to the law laid down by the Full Bench, wherein both sub-sections (3) and (4) of Section 47 have been held to be unconstitutional, the order of the third respondent, to the extent of granting service compensation under Section 47(3) and wages under Section 47(4), must necessarily be set aside.

Sri G.Ramachandra Rao, learned counsel for the first respondent, would however specifically refer to the order of the second respondent in S.E.No.52 of 2001, wherein the second respondent took note of the fact that SLP (Civil) No.7038 of 2000, dated 12-04-2002, was filed against the order of the Full Bench in ***Srinivasa Resorts*** (supra 1) i.e., against W.P.No.18692 of 2001, dated 22-11-2001 and the Supreme Court had directed that status quo as on date, be maintained. Learned counsel would submit that in view of status quo order passed by the Supreme Court and inasmuch as the judgment of the Full Bench in ***Srinivasa Resorts*** (supra 1) has not attained finality, both the 2nd and 3rd respondents were justified in granting service compensation under Sections 47(3) and (4) of the Act. I am afraid I cannot agree. The interim order of the Supreme Court directing maintenance of status quo is an order *inter partes* and does not obliterate the law laid down by the Full Bench. The ratio of a judgment is the reasons assigned in support thereof. When a Court of appeal stays the operation of the judgment, it stays the further implementation, as between the parties, of the operative portion thereof and thereby the ratio of the decision cannot be said to be wiped of. (***GOVT. OF A.P.*** *Vs.* ***N. RAMI REDDY***). Suspension of the judgment of the High Court, by the Apex Court does not obliterate the ratio laid down therein. The effect of suspension of the judgment of a Division Bench of the High Court is only that the judgment shall not be implemented. The dicta decided in the judgment remains operative and is binding on single judges and Division Benches of the High Court until the judgment is set aside by the Supreme Court. (***K. YELLA REDDY*** *Vs.* ***REGISTRAR, APAT***). Merely because an appeal has been preferred to the Supreme Court against an order of this

court, the law declared therein does not cease to have effect and continues to remain in force till it is finally modified or reversed by the Apex Court. The order of the Full Bench in ***Srinivasa Resorts*** (supra 1) is binding not only on this court but also on tribunals and quasi judicial authorities within the state of Andhra Pradesh and since the Full Bench has declared both sub-sections (3) and (4) of Section 47 ultra vires the constitution, the service compensation and wages granted thereunder is without authority of law and is, therefore, required to be set aside.

That leaves us with the question regarding payment of bonus. The very fact that the third respondent has categorically held that the first respondent was entitled for benefits only for the year 1998 and not for 1999 would mean that bonus is payable to him only for one year. The first respondent had submitted his claim for bonus of Rs.12,000/- at Rs.6,000/- per year for two years. Even if, as submitted by Sri G.Ramachandra Rao, the reasoning of the third respondent in this regard is not free from doubt, since the order of the second respondent has been accepted by the first respondent, who has not chosen to challenge the said order before the third respondent, he would, at best, be entitled for the claim of bonus for one year at Rs.6,000/-, and not for two years at Rs.12,000/-.

Sri B.Vijaysen Reddy, learned counsel for the petitioner, would however seek to justify the reasoning given by the second respondent in restricting the claim of the first respondent for bonus to a sum of Rs.2,055/-. The contention of the learned counsel is based on an interpretation of Section 2(23)(e)(ii) of the A.P.Shops and Establishments Act, 1988, whereunder the value of medical expenses or other amenities are excluded from the computation of wages. Learned counsel would submit that the amount which was paid to the first respondent was only by way of reimbursement of actual expenses incurred not exceeding the specified limits being Rs.500/- per month for conveyance expenses; Rs.400/- per month for telephone

expenses; Rs.800/- per month for medical expenses and Rs.300/- per month for gas and electricity. Learned counsel would submit that since the first respondent was not entitled for these amounts, unless actually incurred, these would fall within medical expenses and other amenities and must be excluded from the computation of wages. According to the learned counsel, since they do not amount to allowances, merely on the first respondent fulfilling the terms of the employment, he was not entitled for payment of these amounts unless actually incurred by him each month.

Sri G.Ramachandra Rao, learned counsel for the first respondent, would, however refer to the definition of wages under Section 2(23) and contend that since the definition of wages is wide and includes remuneration by whatever name called and since the first respondent was admittedly paid these amounts every month, he was entitled for inclusion of these amounts, as part of his wages, for computation of the several benefits which were the subject matter of claim both before the second and third respondents.

The larger question as to whether reimbursement of expenses incurred would fall within the exemption under section 2(23)(e)(ii) or not, need not be gone into as it is not in dispute that the first respondent was in fact paid these amounts every month. The finding recorded in this regard, by the second respondent, cannot be said to be contrary to law and the third respondent ought not, therefore, to have interfered with the findings recorded by the second respondent. In any event, since the amount in dispute is less than Rs.4,000/-, (the order of the third respondent requires payment of Rs.2,055/- as bonus as against the claim for Rs.6,000/-), I do not wish to delve any further in this matter and examine the niceties of law regarding entitlement of the first respondent for being paid the differential amount of less than Rs.4,000/-.

As a result, the order of the third respondent in S.A.No.15 of 2002, dated 10-01-2003, is modified and the petitioner herein is directed to pay the first respondent

a sum of Rs.6,000/- representing the bonus payable to him for the year 1998.

Both the writ petitions are accordingly disposed of. There shall be no order as to costs.

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RAMESH RANGANATHAN, J

Date: 25-01-2006

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